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Joseph L. Hoffman

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COURT ACTIONS CONTESTING THE NONJUDICIAL FORECLOSURE OF DEEDS OF TRUST IN WASHINGTON

The Washington Deed of Trust Act was enacted in 1965¹ to provide an alternative to the state's outmoded mortgage foreclosure process. The Act authorizes the foreclosure of deeds of trust without court action.² This nonjudicial foreclosure process makes it easier for a lender to realize on a security interest in real property following a debtor's default. For this reason, deeds of trust have supplanted mortgages as the dominant real property security device in Washington.³

Despite the prevalence of deeds of trust in real property financing, Washington law concerning the nonjudicial foreclosure of deeds of trust is still in a developmental stage. Prior to 1965, nonjudicial foreclosure was prohibited by statute.⁴ Therefore, Washington courts were not called upon to decide cases involving nonjudicial foreclosure until recently. Very few of these cases have reached the appellate courts.

Significant rights and interests are at stake in most nonjudicial foreclosure cases. The debtor stands to lose all rights in the property,⁵ including

1. 1965 Wash. Laws ch. 74, §§ 1-13 (codified as amended at WASH. REV. CODE §§ 61.24.010-.130 (1983)).

2. The Act specifically authorizes a private trustee to exercise the power of sale contained in the deed of trust.

3. An unofficial survey revealed that on March 1, 1984, for example, 615 deeds of trust were recorded in King County as compared with only 17 mortgages. Daily General Index, Indirect, Recording and Filing Office, Records Section, King County Records and Election Division (Mar. 1, 1984).

Mortgages, however, remain the dominant real property security device in the agricultural area. This is because mortgage law permits a debtor to redeem his or her property at any time within one year after the foreclosure sale, WASH. REV. CODE § 6.24.140 (1983), while the Deed of Trust Act expressly denies postsale redemption rights. *Id.* § 61.24.050 (1983). Postsale redemption rights are particularly important in the agricultural area because losses from a single crop failure may temporarily force a farmer into default. The use of mortgages to secure agricultural loans ensures that farmers will not permanently lose their properties as the result of a single crop failure.

4. WASH. REV. CODE § 7.28.230 (1983). In 1965, the Deed of Trust Act created an exception. *See supra* notes 1-2 and accompanying text; *Kennebec, Inc. v. Bank of the West*, 88 Wn. 2d 718, 724-25, 565 P.2d 812, 816 (1977). Deeds of trust could be foreclosed nonjudicially in the Washington Territory prior to 1869, but the remedy was apparently never used. *See id.* at 724, 565 P.2d at 815-16.

5. *See Gose, The Trust Deed Act in Washington*, 41 WASH. L. REV. 94, 101 (1966).

The issue of whether homestead rights survive the nonjudicial foreclosure of a deed of trust was accepted for review by the Washington Supreme Court in the case of *Felton v. Citizens Fed. Sav. & Loan Ass'n*, No. 49070-8 (Wash. Sup. Ct. argued Nov. 29, 1983). As this Comment went to print, the court had not yet filed a decision in *Felton*. The Washington homestead statute exempts homesteads from attachments, executions, and forced sales. WASH. REV. CODE § 6.12.090 (1983); *see also* WASH. CONST. art. XIX, § 1 ("The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."). The homestead statute provides an exception to the homestead exemption for executions and forced sales "in satisfaction of judgments

the right of redemption,⁶ while the lender stands to lose a valuable security interest.⁷ Yet the dearth of reported opinions has left the Washington courts without guidance in deciding cases arising under the Deed of Trust Act. As a result, recent decisions have been based on ad hoc interpretations of particular portions of the Act,⁸ or on speculative notions of legislative intent,⁹ rather than on broader policy considerations.

The basic objectives of Washington real property law and of the Deed of Trust Act can be achieved only through a systematic approach to court actions contesting the nonjudicial foreclosure of deeds of trust. This Comment proposes judicial interpretations and legislative amendments designed to maintain the efficiency of the nonjudicial foreclosure process while enhancing both the fairness of the process and the stability of the land title system.

I. DEED OF TRUST LAW IN WASHINGTON

The deed of trust is a three-party real property security device involving the debtor (or "grantor"), the lender (or "beneficiary"), and the trustee.¹⁰ Under the Washington Deed of Trust Act, the deed of trust is treated as a species of mortgage with a power of sale in the trustee.¹¹

obtained . . . on . . . mortgages on the premises." WASH. REV. CODE § 6.12.100(2) (1983). The statute, however, does not contain an exception to the homestead exemption for trustees' sales under the Deed of Trust Act, probably because it was felt that the elimination of redemption rights in nonjudicial foreclosures under the Act would also eliminate homestead rights. *See Gose, supra*, at 101 n.67.

A statutory exception to the homestead exemption for trustees' sales is not necessary, however, because a trustee's sale is not a "forced sale." *See Morris v. Marshall*, 305 S.E.2d 581, 587-88 (W. Va. 1983). By executing a deed of trust, the debtor consents in advance to the exercise of the power of sale by the trustee upon default. *See id.* Because the homestead statute only exempts the homestead from attachments, executions, and forced sales, the homestead exemption should not apply to trustees' sales. It is hoped, therefore, that the Washington Supreme Court will hold that homestead rights do not survive the nonjudicial foreclosure of a deed of trust.

If the court holds that the homestead exemption applies to trustees' sales, and that homestead rights therefore survive the nonjudicial foreclosure of a deed of trust, then the Washington legislature should amend WASH. REV. CODE § 6.12.100 to provide an exception for trustees' sales.

6. WASH. REV. CODE § 61.24.050 (1983); *see Gose, supra* note 5, at 101.

7. An action contesting the nonjudicial foreclosure of a deed of trust is often combined with an action to quiet title, thus placing the lender's security interest in jeopardy. *See Kennebec, Inc. v. Bank of the West*, 88 Wn. 2d 718, 719, 565 P.2d 812, 813 (1977) (constitutional challenge to Deed of Trust Act combined with action to quiet title).

8. *See Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 304, 584 P.2d 983, 985 (1978) (trustee need not exercise "due diligence" in providing notice of trustee's sale to debtor because Deed of Trust Act does not expressly require "due diligence").

9. *See McPherson v. Purdue*, 21 Wn. App. 450, 452, 585 P.2d 830, 831 (1978) (trustee need not disclose defects in title to prospective purchasers at trustee's sale because disclosure would involve greater time and expense, thus contravening purpose of Deed of Trust Act).

10. *Gose, supra* note 5, at 96.

11. *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn. 2d 372, 375-76, 588 P.2d 1153, 1154

Upon default by the grantor, the beneficiary may either foreclose the deed of trust judicially, as a mortgage,¹² or direct the trustee to commence the nonjudicial foreclosure process.¹³ Nonjudicial foreclosure is usually more efficient than judicial foreclosure.¹⁴ By choosing nonjudicial foreclosure, however, the beneficiary waives the right to a deficiency judgment.¹⁵

The trustee conducts the nonjudicial foreclosure process,¹⁶ which culminates in the trustee's sale. If the proper procedures are followed, the trustee's sale cuts off all rights of the grantor, successors in interest, and junior lienors in the property,¹⁷ including redemption rights.¹⁸ Therefore, the purchaser at the sale immediately acquires title¹⁹ and, after twenty days, may bring an action for unlawful detainer to gain possession of the property.²⁰

(1979). Under the "lien theory" of mortgages, which prevails in Washington, a mortgage does not convey title but merely creates a lien, or security interest, in the mortgagee. Because the deed of trust is considered a species of mortgage in Washington, it does not convey title to the trustee, but merely creates a lien in favor of the beneficiary. In California, also a lien theory state, the deed of trust is not considered a species of mortgage. Instead, deeds of trust differ from mortgages in that deeds of trust convey title to the trustee. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 1.6, at 11-13 (3d ed. 1979) [hereinafter cited as OSBORNE].

12. WASH. REV. CODE § 61.24.100 (1983); *see* *Helbling Bros. v. Turner*, 14 Wn. App. 494, 496-97, 542 P.2d 1257, 1258-59 (1975).

13. The Deed of Trust Act does not specifically provide that the beneficiary may direct the trustee to commence the nonjudicial foreclosure process. The Act does provide, however, that the trustee shall resign at the request of the beneficiary. WASH. REV. CODE § 61.24.010(3) (1983). Therefore, the beneficiary may replace any trustee who refuses to follow the beneficiary's direction to commence the nonjudicial foreclosure process.

14. OSBORNE, *supra* note 11, § 7.19, at 477.

15. WASH. REV. CODE § 61.24.100 (1983). When a deed of trust is foreclosed judicially as a mortgage, the beneficiary may seek a deficiency judgment. *Helbling Bros. v. Turner*, 14 Wn. App. 494, 497-98, 542 P.2d 1257, 1259 (1975).

16. Recent Washington case law indicates that the trustee's duty is limited to performing the bare requirements listed in the Deed of Trust Act. *See, e.g.,* *McPherson v. Purdue*, 21 Wn. App. 450, 452-54, 585 P.2d 830, 831-32 (1978) (trustee has no duty to disclose title defects to prospective purchasers at trustee's sale); *Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 304, 584 P.2d 983, 985 (1978) (trustee has no duty to exercise "due diligence" in providing notice of trustee's sale to grantor).

17. WASH. REV. CODE § 61.24.050 (1983). *But see* discussion of homestead rights, *supra* note 5.

Even the interests of parties who do not receive notice of the trustee's sale may be cut off by the sale. *See* *Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 304, 584 P.2d 983, 985 (1978) (failure of trustee to exercise "due diligence" in providing notice of trustee's sale to grantor held insufficient to preclude summary judgment against grantor in action contesting sale).

18. WASH. REV. CODE § 61.24.050 (1983).

19. One of the basic shortcomings of the mortgage foreclosure process in Washington is the fact that the purchaser at the foreclosure sale does not immediately acquire title to the property. Instead, the purchaser acquires an inchoate interest that ripens into title after the expiration of the one-year redemption period. *See* Gose, *supra* note 5, at 94-95.

20. WASH. REV. CODE § 61.24.060 (1983). The provision does not specify which subsection of the unlawful detainer statute, *id.* § 59.12.030 (1983), may be utilized by the purchaser to obtain possession of the property. None of the six subsections is directly applicable. Nevertheless, § 59.12.030(1), which applies to tenants holding over after the expiration of a specified term and which

Two kinds of claims²¹ may be presented in an action contesting the nonjudicial foreclosure of a deed of trust.²² Substantive claims challenge the facts allegedly supporting the foreclosure of the deed of trust.²³ Procedural claims challenge the conduct of the nonjudicial foreclosure process.²⁴ The grantor or any other interested party may raise these claims in court either prior to or following the trustee's sale.

A. Presale Remedies

Prior to the trustee's sale, an action may be brought to enjoin the sale.²⁵

requires no notice prior to filing of the unlawful detainer action, should be available to the purchaser for two reasons. First, because the Deed of Trust Act allows the grantor or successor in interest to remain in possession for 20 days after the sale, *id.* § 61.24.060, the party in possession after 20 days is analogous to a tenant holding over after the expiration of a specified term. Second, in most cases the party in possession had actual knowledge of the foreclosure and needs no further notice prior to the filing of the unlawful detainer action.

21. A third kind of claim, based on the due process clauses of the United States and Washington Constitutions, has been rejected by the Washington Supreme Court on the grounds that the nonjudicial foreclosure of deeds of trust does not involve "state action." *Kennebec, Inc. v. Bank of the West*, 88 Wn. 2d 718, 726, 565 P.2d 812, 816 (1977). For an extensive discussion of the constitutional problems of nonjudicial foreclosure, see OSBORNE, *supra* note 11, §§ 7.23-.30, at 497-519.

22. Some commentators distinguish claims that render a trustee's sale "void" from those that render the sale "voidable." Void sales are ineffective and do not pass title to the purchaser, while voidable sales are effective but may be set aside until the property is acquired by a bona fide purchaser. See OSBORNE, *supra* note 11, § 7.20, at 477-79. The void/voidable distinction is not helpful in deciding cases involving nonjudicial foreclosure because it is based on the consequences of the claims raised rather than on the nature of the claims.

23. Examples of substantive claims include claims that the debt was paid or tendered, that the deed of trust is not in default, or that the deed of trust was obtained by fraud.

24. Examples of procedural claims include claims that notice was not properly provided, that the trustee's sale was held at an improper place or time, or that collusive bidding depressed the sale price.

25. WASH. REV. CODE § 61.24.130(1) (1983); see *Hardcastle v. Greenwood Sav. & Loan Ass'n*, 9 Wn. App. 884, 885-86, 516 P.2d 228, 230 (1973).

A shrewd grantor might attempt to delay a scheduled trustee's sale by filing an action to quiet title to the property pursuant to WASH. REV. CODE §§ 7.28.010-.320 (1983) and, simultaneously, filing a notice of lis pendens pursuant to WASH. REV. CODE § 4.28.320 (1983). The filing of a notice of lis pendens is authorized in conjunction with any action "affecting the title to real property." *Id.* A notice of lis pendens serves as a warning that the title to the property is the subject of pending litigation. As a practical matter, the filing of the notice of lis pendens would cause prospective purchasers and title companies to avoid the trustee's sale. Cf. *infra* notes 75-77 and accompanying text (discussing practical effects of allowing pending injunction action to survive as a cloud over completed trustee's sale). Therefore, the beneficiary would be forced to postpone the trustee's sale until a hearing on the merits of the quiet title action could be obtained. See *infra* notes 76-77 and accompanying text.

To prevent this evasion of the efficient nonjudicial foreclosure process provided by the Deed of Trust Act, the Washington legislature should amend WASH. REV. CODE § 4.28.320 to provide that a notice of lis pendens cannot be filed after the commencement of the nonjudicial foreclosure of a deed of trust covering the property. Between the commencement of the nonjudicial foreclosure process and the completion of the trustee's sale, the grantor and other interested parties should be limited to the injunction remedy provided by the Deed of Trust Act.

Until the legislature so acts, Washington courts should be quick to dismiss actions to quiet title whenever such actions are filed after the commencement of the nonjudicial foreclosure process. Fol-

The Deed of Trust Act manifests a legislative preference for the presale injunction remedy by reserving to the grantor, successors in interest, and other interested parties the right to restrain the trustee's sale "on any proper ground."²⁶

The injunction action consists of two stages: the temporary injunction and the permanent injunction. The grant of the temporary injunction merely prevents the trustee's sale from taking place until a full hearing on the merits of the permanent injunction can be obtained. The grant or denial of the permanent injunction, on the other hand, constitutes the final resolution of the action. If the permanent injunction is granted, the trustee is precluded from conducting the sale on the grounds of the particular alleged default. If the injunction is dissolved, the trustee may sell the property, either on the originally scheduled date or on a new date set by the court.²⁷

The Act specifies only two procedural requirements that must be met before an injunction against the sale can be granted.²⁸ First, a party seeking to restrain the sale must give five days' notice to the trustee and the beneficiary of the time and place of the hearing on the injunction.²⁹ Second, a party seeking to restrain the sale of a single-family dwelling must

lowing dismissal of an action to quiet title, the court should order the cancellation of the notice of lis pendens upon application of the beneficiary pursuant to § 4.28.320.

26. WASH. REV. CODE § 61.24.130(1) (1983). None of Washington's neighbor states have provisions in their deed of trust statutes expressly reserving the right to enjoin the trustee's sale. *See* CAL. CIV. CODE §§ 2924-2924h (West 1974 & Supp. 1983); OR. REV. STAT. §§ 86.705-.795 (1981); IDAHO CODE §§ 45-1501 to -1515 (1977 & Supp. 1983); MONT. CODE ANN. §§ 71-1-301 to -321 (1983). *But see, e.g.*, MISS. CODE ANN. § 11-13-21 (1972); N.C. GEN. STAT. § 45-21.34 (1976).

27. WASH. REV. CODE § 61.24.130(3) (1983).

28. The Act does not, for example, specify the required venue for an action to enjoin a trustee's sale. The proper venue for an injunction action is generally the county of the defendant's residence. This is because injunction actions are equitable in nature, and equity acts in personam. *State ex rel. Martin v. Superior Court*, 97 Wash. 358, 371, 166 P. 630, 634 (1917); L. ORLAND, 2 WASHINGTON PRACTICE § 43(2), at 74 (3d ed. 1972). When an action to enjoin a trustee's sale is combined with an action to quiet title, however, the proper venue may be the county where the property is located. The venue problem is further complicated by the statutory requirement that the trustee notify the grantor or successor in interest of the proper venue for an action contesting nonjudicial foreclosure. *See* WASH. REV. CODE § 61.24.040(2) (1983). The Washington legislature should resolve the venue problem by amending the venue statute, *id.* § 4.12.010(1) (1983), to provide that actions contesting nonjudicial foreclosure must be brought in the county where the property is located. This would be consistent with the proper venue for mortgage foreclosure actions.

The Act also fails to specify the required parties for an action to enjoin a trustee's sale. Nevertheless, the grantor should name both the beneficiary and the trustee in such an action. If only the trustee were named, the beneficiary would not be subject to the injunction and could foreclose the deed of trust by appointing a successor trustee. *See supra* note 13.

29. WASH. REV. CODE § 61.24.130(2) (1983). The Act also prohibits the grant of an injunction absent proof of service on the trustee. *Id.* It is unclear whether the proof of service provision adds anything to the requirement that the trustee and the beneficiary receive five days' notice of the hearing on the injunction.

post a bond of "at least" \$250.³⁰ An ambiguous clause in the Act seems to require that the amount of the bond also include the entire unaccelerated amount in default.³¹

Only one reported case in Washington has resulted in the grant of an injunction against a trustee's sale.³² In *Hardcastle v. Greenwood Savings & Loan Association*,³³ the Washington Court of Appeals upheld the grant of a permanent injunction because the beneficiary had "both created and maintained the conditions which made it impossible for [the grantor] to comply with the terms of the deed of trust."³⁴ The court, however, failed to define the general scope of the injunction remedy or give meaning to the statutory phrase "on any proper ground."³⁵

B. Postsale Remedies

Following the trustee's sale, the remedies available to the grantor in-

30. *Id.* § 61.24.130(1). The injunction bond provision was added to the Act in 1975. Act of May 31, 1975, ch. 129, § 6, 1975 Wash. Laws 478, 487. The provision was intended to limit the amount of the injunction bond in connection with the sale of a single-family dwelling. Leen & Gose, *Non-Judicial [sic] Deed of Trust Foreclosures [sic]*, WASH. STATE BAR NEWS, July-Aug. 1975, at 36, 39-40. The provision was amended in 1981. Act of May 14, 1981, ch. 161, § 8, 1981 Wash. Laws 787, 797.

31. WASH. REV. CODE § 61.24.130(1) (1983). The clause provides:

[T]he court shall require as a condition of continuing the restraining order that the party seeking to restrain the sale shall pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed. In the case of a default in making the monthly payment of principal and interest and reserves, such sums shall be the monthly payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

There are at least three possible interpretations of the clause. First, the amount of the bond might include the entire unaccelerated amount allegedly in default, along with the payments due after the restraining order is issued. Second, the amount of the bond might include only the amount admittedly in default, along with the payments due after the restraining order is issued. Third, the amount of the bond might include only the payments due after the restraining order is issued. For a general discussion of tender requirements, see OSBORNE, *supra* note 11, § 7.22, at 491-92.

32. The Washington Supreme Court recently reversed the grant of an injunction against a trustee's sale in *Mahalko v. Arctic Trading Co.*, 99 Wn. 2d 30, 659 P.2d 502 (1983). The court of appeals had granted the injunction to allow the purchaser at an execution sale of the property to establish her title. *Mahalko v. Arctic Trading Co.*, 29 Wn. App. 411, 414, 628 P.2d 859, 861 (1981), *rev'd*, 99 Wn. 2d 30, 659 P.2d 502 (1983). The court of appeals held that the title resulting from the execution sale related back to the date of a judgment preceding the execution of the deed of trust. *Id.* The supreme court reversed, holding that the homestead statute precluded the judgment from attaching to the property. *Mahalko*, 99 Wn. 2d 30, 35-37, 659 P.2d 502, 504-05 (1983).

33. 9 Wn. App. 884, 516 P.2d 228 (1973).

34. *Id.* at 889, 516 P.2d at 232. The beneficiary had allowed a fire insurance policy to lapse without notifying the grantor. After fire damaged the property, the beneficiary breached an agreement to supply the grantor with funds necessary to restore the property to income-producing status.

35. The phrase "on any proper ground" is contained in WASH. REV. CODE § 61.24.130(1) (1983). See *supra* note 26 and accompanying text.

clude bringing an action to set aside the sale,³⁶ bringing an action for damages for wrongful foreclosure against the beneficiary or the trustee,³⁷ and defending against an action for unlawful detainer brought by the purchaser of the property.³⁸ The Deed of Trust Act discourages the use of postsale remedies in three ways. First, the Act does not expressly provide for any court actions to contest a completed trustee's sale. Second, the Act indicates that the right to contest a completed sale may be waived by a party's failure to bring a presale injunction action.³⁹ Finally, the Act requires that the trustee's deed issued to the purchaser "recite the facts showing that the sale was conducted in compliance with all of the requirements" of the Act and the particular deed of trust.⁴⁰ This recital of statutory compliance is "prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value."⁴¹

36. See *Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 303, 584 P.2d 983, 985 (1978).

37. See *id.* The availability of an action for damages against the trustee should be limited to situations involving the trustee's alleged failure to perform a statutory duty. In all other situations, the proper remedy is an action for damages against the beneficiary.

38. But see *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971), in which the court indicated that a defense to foreclosure that arises prior to the date of the trustee's sale may not be raised for the first time in an unlawful detainer action.

As a fourth postsale remedy, the grantor may file a bankruptcy petition within one year after the sale and seek to have the sale avoided as a fraudulent transfer. See 11 U.S.C. § 548(a) (1982). The U.S. Court of Appeals for the Fifth Circuit has upheld such an avoidance when the property sold for less than 70% of its market value. See *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (applying § 67(d) of the Bankruptcy Act, Act of June 22, 1938, ch. 575, sec. 1, § 67(d), 52 Stat. 840, 877 (previously codified at 11 U.S.C. § 107(d) (partially repealed and renumbered effective Oct. 1, 1979))). The U.S. Court of Appeals for the Ninth Circuit has thus far declined to address the issue of whether a trustee's sale can be a fraudulent transfer under federal bankruptcy law. See *Lawyers Title Ins. Corp. v. Madrid*, 21 Bankr. 424, 426 (9th Cir. 1982). The possible use of federal bankruptcy law to set aside a completed trustee's sale is discussed in Coppel & Kann, *Defanging Durrett: The Established Law of "Transfer,"* 100 BANKING L.J. 676 (1983).

39. The notice of trustee's sale mandated by the Act contains the following language:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the trustee's sale.

WASH. REV. CODE § 61.24.040(1)(f) (1983). The Act provides that the notice of trustee's sale must be (1) recorded, (2) posted on the property or personally served on the occupant, (3) published in a legal newspaper, (4) mailed to all persons with an interest in or a lien or claim of lien against the property, (5) mailed to all persons who have filed a court action to foreclose on the property, and (6) mailed to all persons who have requested such notice in writing to the trustee. *Id.* § 61.24.040(1), (3).

40. *Id.* § 61.24.040(7).

41. *Id.* In *Johnson v. Johnson*, 25 Wn. 2d 797, 172 P.2d 243 (1946), the Washington Supreme Court construed a similar recital of statutory compliance in a California trustee's deed. The court stated that the purpose of the recital "undoubtedly was to protect innocent third persons purchasing at the trustee's sale, and not the beneficiary of the trust who purchased at the sale." *Id.* at 804, 172 P.2d at 247. Therefore, the recital created only a rebuttable presumption of procedural validity when invoked by the beneficiary, who had purchased the property at the trustee's sale.

No reported case in Washington has resulted in the invalidation of a completed trustee's sale⁴² or in an award of damages for wrongful foreclosure of a deed of trust. Moreover, the Washington Court of Appeals has expressed a general disfavor with postsale remedies. In *Peoples National Bank v. Ostrander*,⁴³ the grantor of a deed of trust did not seek to enjoin or invalidate the trustee's sale but instead attempted to defend against the unlawful detainer action brought by the purchaser. The grantor alleged that the deed of trust had been obtained by fraud. The court of appeals did not permit the grantor to raise his defense to foreclosure, stating that "[t]o allow one to delay asserting a defense until this late stage of the proceedings would be to defeat the spirit and intent of the trust deed act."⁴⁴

II. COURT ACTIONS CONTESTING THE NONJUDICIAL FORECLOSURE OF DEEDS OF TRUST—A SYSTEMATIC APPROACH

A proper approach to court actions contesting the nonjudicial foreclosure of deeds of trust should further three basic objectives. First, the nonjudicial foreclosure process should remain efficient and inexpensive.⁴⁵ Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.⁴⁶ Third, the resultant land titles should be stable.⁴⁷

These objectives are often difficult to reconcile. For example, requiring a summary hearing prior to every deed of trust foreclosure would provide

42. In *Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 584 P.2d 983 (1978), the court of appeals reversed a grant of summary judgment for the defendants, who included the trustee and the purchaser at the sale, and remanded for trial on the issue of whether the trustee's sale should be set aside.

43. 6 Wn. App. 28, 491 P.2d 1058 (1971).

44. *Id.* at 32, 491 P.2d at 1060.

45. One of the original goals of the Deed of Trust Act was to provide an alternative to the time-consuming mortgage foreclosure process and save substantial time and money for both the borrower and the lender. *See id.* at 31, 491 P.2d at 1060; Gose, *supra* note 5, at 94-96.

46. The Washington Supreme Court has stated that "it is imperative that all citizens be afforded effective access to our justice machinery to redress their grievances." *Carter v. University of Wash.*, 85 Wn. 2d 391, 394, 536 P.2d 618, 621 (1975), *overruled on other grounds*, *Housing Auth. v. Saylor*, 87 Wn. 2d 732, 738-42, 557 P.2d 321, 325-27 (1976).

In a mortgage foreclosure action, it is improper for a court to enter a foreclosure decree prior to a hearing on the merits of the debtor's defenses to foreclosure. *Lewis County Sav. & Loan Ass'n v. Black*, 60 Wn. 2d 362, 370-71, 374 P.2d 157, 163 (1962). When the Deed of Trust Act was enacted, the intent was that deeds of trust would offer debtors the same protections as mortgages. *See Gose, supra* note 5, at 104.

47. *See Graves v. Elliott*, 69 Wn. 2d 652, 656, 419 P.2d 1008, 1011 (1966). *See generally OSBORNE, supra* note 11, § 7.19, at 477 (land titles produced by nonjudicial foreclosure have proven less stable than those produced by judicial foreclosure).

a fair opportunity to prevent wrongful foreclosure,⁴⁸ but would destroy the efficiency of the foreclosure process.⁴⁹ Similarly, allowing an unlimited right to contest a completed trustee's sale would provide a fair opportunity to challenge a wrongful foreclosure,⁵⁰ but would produce instability in the land title system. Finally, restricting both presale and postsale remedies would maintain efficiency and the stability of the land title system, but would not provide a fair opportunity to prevent wrongful foreclosure.

In order to further all three objectives, the presale injunction remedy should be made more freely available and the use of postsale remedies should be restricted. This approach would maintain the efficiency of the nonjudicial foreclosure process by permitting deed of trust foreclosures without a mandatory prior hearing. At the same time, it would provide a fair opportunity for interested parties to prevent wrongful foreclosure through the injunction action. Finally, it would preserve the stability of the land title system by restricting the use of postsale remedies. The suggested judicial interpretations and legislative amendments that follow are designed to further these desired objectives.

A. *A Systematic Approach to Presale Remedies*

1. *Demonstrating Grounds for a Temporary Injunction*

In an action to enjoin a trustee's sale, the grantor or other interested party usually first seeks a temporary injunction.⁵¹ In general, a party seeking a temporary injunction must demonstrate (1) a clear legal or equitable right to relief, (2) a well-grounded fear of invasion of that right, and (3) actual and substantial injury as a result of the invasion.⁵²

The greatest obstacle facing a grantor seeking to temporarily enjoin a trustee's sale is the requirement that he or she demonstrate a clear legal or equitable right to relief.⁵³ The Washington courts have held that, in order

48. In North Carolina, for example, a summary hearing before a clerk of the court is required prior to every deed of trust foreclosure. N.C. GEN. STAT. § 45-21.16 (Supp. 1981).

49. For this reason, a proposal to require a hearing prior to every deed of trust foreclosure was rejected by the Washington legislature in 1974. See Leen & Gose, *supra* note 30, at 36.

50. In Texas, for example, a completed trustee's sale may be contested up to 10 years after the recording of the trustee's deed. TEX. REV. CIV. STAT. ANN. art. 5523a (Vernon 1958); see Calverly v. Gunstream, 497 S.W.2d 110, 113-14 (Tex. 1973).

51. Under the Deed of Trust Act, the trustee's sale may take place any time on or after 190 days from the date of the default. WASH. REV. CODE § 61.24.040(8) (1983). Due to delays caused by congested court calendars, a temporary injunction is usually required to prevent the trustee's sale from taking place before the final resolution of the injunction action.

52. *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wn. 2d 317, 319, 324 P.2d 1099, 1101 (1958).

53. The grantor should have little difficulty demonstrating the other two requirements for a tem-

to meet this requirement, a party seeking a temporary injunction must demonstrate a likelihood of success on the merits.⁵⁴ According to the Washington Supreme Court, an injunction "will not issue in a doubtful case."⁵⁵ In one case, even the presence of a "'substantial' constitutional question" was held insufficient to meet the requirement of a clear legal or equitable right to relief.⁵⁶

The Washington courts have also emphasized, however, that all of the requirements for a temporary injunction must be examined in light of the relative interests of the parties.⁵⁷ In the context of nonjudicial foreclosure, such an examination reveals that a foreclosing beneficiary often stands to lose little if the court issues a temporary injunction pending a full hearing on the merits.⁵⁸ In contrast, if the court does not issue the temporary injunction, the grantor loses the opportunity to prevent the trustee's sale and, under certain circumstances, may not be permitted to contest the completed sale.⁵⁹ Furthermore, even if postsale remedies are available, those remedies may be inadequate substitutes for the presale injunction remedy.⁶⁰ Therefore, in considering whether to issue a temporary injunction against a trustee's sale, a court should weigh carefully the relative interests of the parties and, in many cases, reduce the grantor's burden of proof concerning the existence of a clear legal or equitable right to relief.⁶¹

porary injunction. The pending trustee's sale is evidence of the well-grounded fear of invasion. The risk of losing the property is evidence of the actual and substantial injury as a result of the invasion.

54. Tyler Pipe Indus., Inc. v. State Dep't of Revenue, 96 Wn. 2d 785, 793-94, 638 P.2d 1213, 1217-18 (1982).

55. Isthmian S.S. Co. v. National Marine Eng'rs Beneficial Ass'n, 41 Wn. 2d 106, 117, 247 P.2d 549, 556 (1952).

56. Tyler Pipe Indus., Inc. v. State Dep't of Revenue, 96 Wn. 2d 785, 793-94, 638 P.2d 1213, 1217-18 (1982).

57. *Id.* at 792, 638 P.2d at 1217.

58. Although the beneficiary stands to lose the use of either the property or the proceeds of the trustee's sale during the pendency of the temporary injunction, the injunction bond should indemnify the beneficiary against losses resulting from a wrongful injunction. *See infra* text accompanying notes 62-69. Only if the injunction bond is waived or reduced by the court can the beneficiary be significantly harmed by the grant of the temporary injunction. *See infra* text accompanying notes 70-72.

59. *See infra* text accompanying notes 73-91.

60. *See* Nevada Escrow Serv., Inc. v. Crockett, 91 Nev. 201, 533 P.2d 471, 472 (1975).

61. The standard for determining whether to issue the temporary injunction may also depend on the kind of claim raised by the grantor. For example, if the grantor claims that the beneficiary refused proper tender of the amount due, the court may be able to determine the "likelihood of success on the merits" with relative ease. On the other hand, if the grantor claims that the deed of trust was obtained by fraud, the ultimate outcome may be less clear. In such a case, a less strict standard for demonstrating a "clear legal or equitable right to relief" may be appropriate. *See id.* When there is a substantial possibility that the grantor has a valid defense to foreclosure, the beneficiary's interest in efficiency should not prevail over the grantor's interest in a full hearing on the merits.

2. *Amount of the Temporary Injunction Bond*

Once the grantor has demonstrated the requisite grounds for the issuance of a temporary injunction, he or she must post an injunction bond.⁶² The injunction bond is designed to indemnify the enjoined party against damages resulting from a wrongful temporary injunction.⁶³ The bond requirement discourages abuse of the temporary injunction remedy.⁶⁴ In the context of nonjudicial foreclosure, however, the bond requirement should be modified in two ways.

First, the courts should construe the ambiguous clause in the bond provision of the Washington Deed of Trust Act⁶⁵ in a manner consistent with legislative intent. According to the primary drafters of the provision,⁶⁶ the intent was that the amount of the injunction bond in an action to prevent the sale of a single-family dwelling be equal to the sums due on the obligation secured by the deed of trust between the commencement of the nonjudicial foreclosure process and the final resolution of the injunction action,⁶⁷ plus costs and other expenses likely to be sustained by the beneficiary.⁶⁸ The injunction bond was not intended to include any sums due on the obligation secured by the deed of trust prior to the commencement of the nonjudicial foreclosure process. Under the Deed of Trust Act, the foreclosing beneficiary must look solely to the property for satisfaction of the obligation,⁶⁹ and therefore should not be allowed to treat sums due prior to the commencement of the foreclosure process as damages resulting from the temporary injunction.

Second, the legislature should amend the statutory bond provision. Absent direct statutory authorization, the Washington courts are not free to waive an injunction bond.⁷⁰ The statutory bond provision is thus susceptible to attack on equitable and possibly constitutional grounds.⁷¹ The leg-

62. WASH. SUPER. CT. CIV. R. 65(c); *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343, 345–47, 541 P.2d 1014, 1015–17 (1975).

63. *Swiss Baco*, 14 Wn. App. at 345, 541 P.2d at 1016.

64. *Id.*

65. WASH. REV. CODE § 61.24.130(1) (1983); *see supra* note 31.

66. The provision was a compromise between the lenders, represented primarily by John A. Gose, and the Legal Services lawyers, represented primarily by David Leen. *See Leen & Gose, supra* note 30, at 36–37.

67. *Id.* at 40.

68. Such costs might include, for example, the cost of advertising the rescheduled trustee's sale and a fair rate of interest on the amount likely to be realized by the beneficiary from the trustee's sale.

69. By electing to foreclose nonjudicially under the Act, the beneficiary waives the right to a deficiency judgment against the grantor. WASH. REV. CODE § 61.24.100 (1983).

70. *Irwin v. Estes*, 77 Wn. 2d 285, 286, 461 P.2d 875, 876 (1969).

71. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). At least one commentator has suggested that actions to quiet title may be within the class of fundamental, state-controlled interests protected under *Boddie*. *See Comment, The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U.L. REV. 129, 154 n.145 (1974). Actions contesting the nonjudicial foreclosure of deeds of trust

islature should remove the \$250 minimum limit and authorize the courts either to waive or to reduce the amount of the injunction bond upon a showing of indigency.⁷²

3. *Necessity for a Temporary Injunction*

If the grantor fails to secure a temporary injunction prior to the scheduled date of the trustee's sale, the sale may proceed as scheduled.⁷³ The Washington courts, however, have not fully explored the consequences of the grantor's failure to secure a temporary injunction against the sale.⁷⁴ An examination of the purposes of the Deed of Trust Act compels the conclusion that, once the trustee's sale is completed, any pending injunction action should be dismissed as moot. The grantor's remedies should be limited to an action to set aside the sale or an action for damages for wrongful foreclosure.

Allowing the pending injunction action to survive as a cloud over the trustee's sale⁷⁵ would destroy the efficiency of the nonjudicial foreclosure process. No matter how meritless a grantor's defense to foreclosure might be, prospective purchasers and title companies would certainly avoid a trustee's sale held subject to a pending injunction action. Therefore, the beneficiary would be forced to postpone the trustee's sale until a hearing on the merits of the permanent injunction could be obtained.⁷⁶ This could mean a delay of a year or longer before the trustee's sale could take place.⁷⁷ In short, if the injunction action were allowed to survive the completion of the trustee's sale, nonmeritorious injunction actions would become an effective instrument of delay for grantors. The nonjudicial fore-

may also be within the protected class of interests. The fact that nonjudicial foreclosure does not involve "state action" does not preclude a constitutional attack on the bond requirement, because the alleged denial of due process is based on lack of access to the courts rather than on a deprivation of property as a result of the foreclosure by the beneficiary.

72. The requisite showing of indigency could be adapted from *Housing Auth. v. Saylor*, 87 Wn. 2d 732, 743-44, 557 P.2d 321, 328 (1976).

73. In most cases, the grantor could not possibly secure a permanent injunction prior to the date of the trustee's sale. See *supra* note 51.

74. See generally *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058, 1060-61 (1971) (grantor denied opportunity to contest completed trustee's sale as a result of failure to enjoin sale).

75. See *OSBORNE*, *supra* note 11, § 7.22, at 491.

76. *Id.* Of course, if the grantor's defense to foreclosure is clearly frivolous, the beneficiary or trustee may successfully move for summary judgment. However, the presence of any issue of material fact would preclude summary judgment and require the beneficiary or trustee to wait for a trial date.

77. In King County Superior Court, for example, the average wait for a trial date in a civil, nonjury case is 12 months from the date that the case is noted for trial. Telephone interview with Ruth Peralta, Deputy Court Clerk, Calendar Control Office, King County Department of Judicial Administration (Mar. 6, 1984) (notes on file with the *Washington Law Review*).

closure process would be no more efficient than the prior mortgage foreclosure process.

B. A Systematic Approach to Postsale Remedies

The legislative preference for the presale injunction remedy manifested in the Washington Deed of Trust Act is consistent with the objective of preserving the stability of land titles. Nevertheless, postsale remedies are appropriate in some situations.

1. The Action to Set Aside the Trustee's Sale

There are two primary limitations on the right of the grantor, junior lienors, and other interested parties to bring an action to set aside a completed trustee's sale. The first limitation is the doctrine of waiver,⁷⁸ which should preclude an action by a party to set aside a completed trustee's sale whenever the party (1) received notice of the right to enjoin the trustee's sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to enjoin the sale. In most cases, the statutory notices of foreclosure⁷⁹ and trustee's sale⁸⁰ should be sufficient to inform a party of the right to enjoin the sale. Furthermore, most substantive defenses to foreclosure arise early enough to permit the filing of a presale injunction action.⁸¹ Therefore, in most cases, a party's failure to bring a presale injunction action should be held to constitute a waiver of the right to contest the completed sale.⁸²

However, because waiver can occur only when a party has actual or constructive knowledge of the right waived,⁸³ a party should not be held to have waived the right to contest the completed sale if that party was not

78. Waiver consists of the intentional and voluntary relinquishment of a known right. *Bowman v. Webster*, 44 Wn. 2d 667, 669, 269 P.2d 960, 961 (1954). Waiver may be either express or implied. *Id.* Furthermore, knowledge of the right waived may be either actual or constructive. *Id.*

79. The notice of foreclosure mandated by the Deed of Trust Act provides:

You may contest this default by initiating court action in the Superior Court of _____ County. In such action, you may raise any legitimate defenses you have to this default. You may also contest this sale in court by initiating court action. . . . Legal action on your part may prevent or restrain the sale, but only if you persuade the court of the merits of your defense.

WASH. REV. CODE § 61.24.040(2) (1983).

80. See *supra* note 39.

81. Substantive defenses based on the validity of the debt or deed of trust generally arise prior to the commencement of the nonjudicial foreclosure process. Substantive defenses based on the existence of the default generally arise upon receipt of the notice of default.

82. Cf. *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058, 1060-61 (1971) (presale injunction action held adequate remedy at law for grantor seeking to contest nonjudicial foreclosure).

83. *Bowman v. Webster*, 44 Wn. 2d 667, 669, 269 P.2d 960, 961 (1954).

provided with the proper statutory notices⁸⁴ or was justifiably unaware of a defense to foreclosure until after the sale was completed. In addition, a party who unsuccessfully attempted to enjoin the sale should not be held to have waived the right to contest the completed sale. Under such circumstances, an action to set aside the trustee's sale may be appropriate.

The second limitation on the right to bring an action to set aside a completed trustee's sale is the provision of the Deed of Trust Act stating that the required⁸⁵ recital of statutory compliance constitutes "prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value."⁸⁶ This provision is self-explanatory. In all cases, the recital of statutory compliance creates at least a rebuttable presumption that the nonjudicial foreclosure was conducted in compliance with the procedural requirements of the Act.⁸⁷ Moreover, once a bona fide purchaser acquires the property, the procedural validity of the nonjudicial foreclosure cannot be challenged by means of an action to set aside the trustee's sale.⁸⁸ These consequences follow even if the party seeking to contest the sale had no opportunity to raise the procedural claims prior to the sale.

The limitations on the right of the grantor, junior lienors, and other interested parties to bring an action to set aside a completed trustee's sale reduce the probability that the title acquired by the purchaser at the sale will be subjected to protracted legal challenges. The limitations thus further the objective of preserving the stability of the land title system.

2. *The Action for Damages for Wrongful Foreclosure*

The action for damages for wrongful foreclosure against the trustee⁸⁹ or the beneficiary does not affect the stability of the land title system. Nevertheless, the doctrine of waiver should limit the availability of such

84. A party who is responsible for the failure of the trustee to provide the proper statutory notices should be held to possess constructive knowledge of the right to enjoin the sale. This may occur, for example, when a party moves without providing the trustee with a forwarding address.

85. WASH. REV. CODE § 61.24.040(7) (1983); *see supra* text accompanying note 40.

86. WASH. REV. CODE § 61.24.040(7) (1983).

87. The presumptions created by the recital of statutory compliance should apply only to procedural claims. *See* OSBORNE, *supra* note 11, § 7.21, at 489-90. *But see* IDAHO CODE §§ 45-1509 to -1510 (1977); MONT. CODE ANN. § 71-1-318 (1983) (recital of statutory compliance creates presumption of existence of default, as well as presumption of procedural validity of nonjudicial foreclosure).

88. Even if the bona fide purchaser later sells or transfers the property to a party who knew of the procedural defect, the recital of statutory compliance should preclude challenges to the procedural validity of the nonjudicial foreclosure. Otherwise, the bona fide purchaser would have only a limited right to sell or transfer the property.

89. *But see supra* note 37, discussing limitations on availability of an action for damages against the trustee.

actions. As with the action to set aside the trustee's sale, the action for damages for wrongful foreclosure should be available only when the injured party was not provided with the proper statutory notices, was justifiably unaware of the existence of a defense to foreclosure, or unsuccessfully attempted to enjoin the trustee's sale.⁹⁰

The recital of statutory compliance does not preclude an action for damages against the trustee or the beneficiary.⁹¹ In fact, when the recital of statutory compliance precludes an action to set aside the trustee's sale, an injured party's only remaining remedy is to bring an action for damages against the trustee or the beneficiary.

The measure of damages in an action for wrongful foreclosure should depend on the party bringing the action and on the kind of claim raised. If the grantor, for example, raises a substantive defense to foreclosure, the damages should be the amount of the grantor's equity in the property at the time of the sale, reduced by any proceeds the grantor received from the sale.⁹² If the grantor raises a procedural claim, however, the damages should be the difference between the amount of the outstanding debt and the price that would have been obtained for the property had the procedural defect not occurred.⁹³ The plaintiff in the action for damages for wrongful foreclosure bears the burden of proof concerning the amount of damages.

3. *The Special Problem of Lack of Notice*

The Washington courts have had difficulty resolving postsale challenges to nonjudicial foreclosure based on the trustee's failure to provide the grantor, junior lienors, or other interested parties with the proper statutory notices.⁹⁴ Some courts have drawn an analogy between a party deprived of notice in a nonjudicial foreclosure situation and an omitted party

90. See *supra* text accompanying notes 83–84.

91. Even if the property is held by a bona fide purchaser when the action for damages is filed against the trustee or the beneficiary, the recital of statutory compliance would not constitute conclusive evidence of the procedural validity of the nonjudicial foreclosure because it would not be invoked "in favor of" the bona fide purchaser. See WASH. REV. CODE § 61.24.040(7) (1983). Therefore, the recital of statutory compliance would create only a rebuttable presumption of procedural validity.

92. See OSBORNE, *supra* note 11, § 7.22, at 495; *Guay v. Brotherhood Bldg. Ass'n*, 87 N.H. 216, 177 A. 409, 411 (1935).

93. This amount constitutes the actual damages sustained by the grantor, since the trustee can correct most procedural defects by rescheduling the trustee's sale. If the procedural defect is one that the trustee cannot correct, however, then the measure of damages should be the same as in the case of a substantive claim.

94. See *Equitable Sav. & Loan Ass'n v. Yothers*, No. 82-2-03943-6, slip op. (Snohomish County, Wash., Super. Ct., July 11, 1983).

in a mortgage foreclosure action.⁹⁵ These courts have concluded that the failure of the trustee to provide a party with notice renders the trustee's sale "void"⁹⁶ with respect to that party.⁹⁷

However, this analogy is inappropriate. The purpose of joining all interested parties in a mortgage foreclosure action differs from the purpose of providing notice to all interested parties in a nonjudicial foreclosure situation. The joinder of all interested parties in a mortgage foreclosure action gives the court jurisdiction over the parties and enables the court to order the foreclosure and sale of the parties' interests.⁹⁸ On the other hand, in a nonjudicial foreclosure situation notice is not a jurisdictional requirement.⁹⁹ Instead, notice serves only to protect the rights of interested parties.¹⁰⁰ Notice serves this purpose by (1) providing the opportunity for the parties to enjoin the trustee's sale,¹⁰¹ (2) providing the oppor-

95. This tendency is understandable because deeds of trust are relatively new in Washington while mortgages have been widely used in the state for over 100 years. *See supra* notes 3-4 and accompanying text.

96. A "void" sale does not pass title to the purchaser and can therefore be set aside even against a bona fide purchaser. *See supra* note 22.

97. *See Equitable Sav. & Loan Ass'n v. Yothers*, No. 82-2-03943-6, slip op. (Snohomish County, Wash., Super. Ct., July 11, 1983).

98. *See OSBORNE, supra* note 11, § 7.12, at 447. If a party holding an interest subordinate to the mortgage is not joined in the foreclosure action, the omitted party and the subordinate interest are not subject to the court's order. *See id.* § 7.13, at 453. Therefore, as far as the omitted party is concerned, the foreclosure sale is void and his or her rights are the same as before the foreclosure. *See id.* § 7.15, at 459.

99. Because the nonjudicial foreclosure of a deed of trust does not require court action and does not result in a court order, there is no requirement that jurisdiction be established over any of the interested parties. By executing the deed of trust, the grantor consents in advance to the exercise of the power of sale by the trustee upon default. Parties holding interests subordinate to the deed of trust have either actual or constructive knowledge of the grantor's execution of the deed of trust and, therefore, of the grantor's prior consent to the exercise of the power of sale by the trustee. *See* 1 G. GLENN, MORTGAGES, DEEDS OF TRUST AND OTHER SECURITY DEVICES AS TO LAND § 110.1 (1943).

Constitutional due process does not require that notice of nonjudicial foreclosure be provided to all interested parties. Because the nonjudicial foreclosure of a deed of trust in Washington does not involve "state action," the due process clauses of the United States and Washington Constitutions are inapplicable. *Kennebec, Inc. v. Bank of the West*, 88 Wn. 2d 718, 726, 565 P.2d 812, 816 (1977); *see also* *Scott v. Paisley*, 271 U.S. 632 (1926) (Georgia statute permitting nonjudicial foreclosure without notice to holders of junior interests held not a violation of due process or equal protection clauses of United States Constitution).

Many deed of trust statutes do not require that the trustee provide notice directly to all interested parties. *See, e.g.,* MISS. CODE ANN. § 89-1-55 (1972) (requiring only notice by advertisement and by posting at courthouse); TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1982) (requiring only notice by posting at courthouse and by mail to each party obligated to pay debt); VA. CODE §§ 55-59.1 to -59.2 (1981) (requiring only notice by advertisement and by mail to present owner of property).

100. *See Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 307, 584 P.2d 983, 987 (1978).

101. *See* Comment, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEX. L. REV. 1085, 1087 (1971).

tunity for the parties to “cure” the default and “reinstate” the deed of trust,¹⁰² and (3) helping to ensure that the property sells for a fair price.¹⁰³

Although the rights of the grantor, junior lienors, and other interested parties deserve the protection provided by notice, the rights of a potential bona fide purchaser at the trustee’s sale also deserve protection. In order to balance the rights of the grantor, junior lienors, and other interested parties with the rights of the bona fide purchaser, postsale challenges to nonjudicial foreclosure based on lack of notice should be resolved in the same manner as postsale actions based on other claims.

For example, if the lack of notice deprives a party of the opportunity to raise a substantive claim prior to the trustee’s sale, then the doctrine of waiver is inapplicable and the substantive claim may be raised in an action to set aside the sale.¹⁰⁴ The recital of statutory compliance, however, limits or precludes an action to set aside the sale based solely on the procedural claim of lack of notice.¹⁰⁵ If the property is held by a party who had actual or constructive knowledge of the lack of notice, then the recital of statutory compliance creates only a rebuttable presumption of procedural validity and an action to set aside the sale based on the lack of notice may be appropriate.¹⁰⁶ Once a bona fide purchaser acquires the property, however, the proper remedy is an action for damages for wrongful foreclosure against the party responsible for the lack of notice.¹⁰⁷ In such an action, the plaintiff must prove that damages were sustained as a result of the lack of notice. In most cases, unless the lack of

102. WASH. REV. CODE § 61.24.090 (1983). The Act provides that the grantor, successors in interest, and junior lienors may “cure” the default prior to the eleventh day before the trustee’s sale by paying the amount in default plus expenses actually incurred by the trustee in enforcing the note and deed of trust. If the default is cured, the deed of trust is “reinstated” and the trustee must record a notice of discontinuance of trustee’s sale. The right to cure the default without the necessity of paying the entire accelerated debt is a significant departure from prior mortgage law.

103. See Comment, *supra* note 101, at 1086; *cf.* S & G Inv. Inc. v. Home Fed. Sav. & Loan Ass’n, 505 F.2d 370, 377–79 (D.C. Cir. 1974) (grantor brought action to set aside trustee’s sale and recover damages against trustee because notice of nonjudicial foreclosure was not provided to junior lienholders, on theory that such notice would have resulted in higher sale price; grant of summary judgment in favor of trustee and beneficiary affirmed because District of Columbia deed of trust statute did not require such notice).

104. See *supra* notes 83–84 and accompanying text. *But see* Morrell v. Arctic Trading Co., 21 Wn. App. 302, 304, 584 P.2d 983, 985 (1978) (court rejected postsale challenge based on lack of notice).

105. See *supra* notes 85–88 and accompanying text.

106. A purchaser at the sale is not precluded from being a bona fide purchaser merely because he or she has constructive knowledge, through the action of the recording statutes, of the interest of the party deprived of notice. In order to lose the status of a bona fide purchaser, the purchaser must have actual or constructive knowledge of the trustee’s failure to provide the proper statutory notices.

The beneficiary, however, should be held to possess constructive knowledge of any lack of notice. This is consistent with the view that the beneficiary cannot be a bona fide purchaser at the trustee’s sale. See *supra* note 41.

107. See *supra* note 91 and accompanying text.

notice led to an unusually low sale price, damages should not be awarded.¹⁰⁸

III. CONCLUSION

The Washington Deed of Trust Act has fulfilled its original promise to provide an alternative to the state's inefficient and expensive mortgage foreclosure process. However, as the nonjudicial foreclosure of deeds of trust becomes more common, the need for a systematic approach to court actions contesting nonjudicial foreclosure will increase. A freely available presale injunction remedy, coupled with restrictions on postsale remedies, will help to accomplish the desired objectives of Washington real property law and of the Deed of Trust Act. A systematic approach to court actions contesting nonjudicial foreclosure will ensure that the Act serves the interests of lenders and debtors alike.

Joseph L. Hoffmann

108. If the party deprived of notice can prove that he or she would have exercised the right to cure the default and reinstate the deed of trust, and that damages were sustained as a result of the inability to exercise this right, then an award of damages would be appropriate even though the property sold for a fair price.